Supreme Court, U.S.
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No. 91-1310

In The

Supreme Court of the United States

October Term, 1991

In the Matter of
THE CENTRAL RAILROAD COMPANY OF NEW JERSEY

NPM GROUP, INC.
(formerly known as WILMAT HOLDINGS, INC.,
as successor-in-interest to Central Jersey Industries, Inc.),

Petitioner,

v.

Joseph Benedetto, Richard C. Anglemeyer, John J. Bilsak, Thomas J. Boyle, James A. Bristol, Neal L. Brown, Glenn N. Carmitchel, George E. Davis, James C. Douglas, Edward J. Finney, William L. Focht, John A. Hosage, Joseph F. Koetting, Joseph F. Kudlesky, Joseph A. Maraski, Walter E. Marienschek, Charles A. May, Andrew G. Michalow, Walter H. Miller, Roger K. Norman, Frank Parano, Lamar N. Purnell, Louis F. Rauch, John J. Rinehart, Paul E. Sakowski, James J. Schweibinz, George R. Searfoss, Robert I. Searfoss, Dale D. Vogel, John Watto and Consolidated Rail Corporation,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit

PETITIONER'S REPLY BRIEF

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PETITIONER'S REPLY BRIEF

Petitioner replies herein to Respondents' Brief in Opposition to the Petition for a Writ of Certiorari.

1. Respondents' Effort to Minimize the Scope of the Third Circuit's Rule is not Supportable.

Contrary to respondents' assertion, the Third Circuit's rule is far broader than one limited to the handling of FELA claims of former railroad employees against a former railroad company which has been reorganized under Section 77 of the former Bankruptcy Act. It is, rather, a general rule for handling any tort claim asserted after the defendant's reorganization in bankruptcy, whether that claim be made under the FELA or otherwise and irrespective of whether the reorganization was under the current Bankruptcy Code or under the former Bankruptcy Act.

The Third Circuit's rule is that, for a tort claim to be dischargeable in bankruptcy reorganization, it is essential that it has ripened into a cause of action which is fully accrued for purposes of the running of the statute of limitations. As discussed in our Petition, this rule has evolved from a thesis enunciated in an earlier ruling of this Circuit Court in *In re Frenville Co.*, 744 F.2d 332 (1984), *cert. denied*, 469 U.S. 1160 (1985). Respondents note that the court below did not cite *Frenville* but relied, rather, on its earlier opinion in *Schweitzer v. Consolidated Rail Corporation*, 758 F.2d 936 (3d Cir. 1985), *cert. denied*, 474 U.S. 864 (1985), among others. (Resp. Brief, p. 8). *Schweitzer*, however, cited and relied upon *Frenville* for a basic rationale –

a rationale which has been rejected in other circuits. (Petition, pp. 12-14, 23-27).

While stressing that the ruling below involved a reorganization under the former Bankruptcy Act, respondents do not contend that the Circuit Court's thesis would not apply to one under the current Bankruptcy Code. The closest they come to any such contention is to point out that the definitions of "claim" in the two statutes are not identical; and this is true. Both definitions, however, are extremely broad. Indeed, it is difficult to say which is broader. More significantly, however, respondents do not point to the materiality here of such differences as they exist.[1] So far as we can ascertain, there are no differences which could have significance under the Third Circuit's rule. Under that rule, tort claims which are unaccrued for any reason would not be dischargeable under either statute and could be asserted post-reorganization against the supposedly rehabilitated debtor. For this reason we said, and we reiterate, that the question presented herein "is of continuing importance to reorganizations under the present statute." (Petition, p. 11). Respondents correctly call it a "far ranging" question (Resp. Brief, p. 5). It results, however, from the "far ranging" rule adopted below.

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[1] Thus, while noting specific inclusion in the Bankruptcy Code definition of a "right to an equitable remedy for breach of performance if such breach gives rise to a right of payment," respondents say nothing about its materiality here, nor why the specific provision in the Code would not be encompassed by the broad concept of "interests of whatever character" in the Bankruptcy Act definition.

2. Respondents' Claim that the Third Circuit's Rule is Consistent with Bankruptcy Policy is Without Merit.

Respondents acknowledge that paramount objectives of federal bankruptcy reorganization are "finality" in regard to the debtor's obligations and a "fresh start" for the reorganized enterprise. (Resp. Brief, p. 7). Nowhere do they explain, or even endeavor to explain, how the Third Circuit's rule is consistent with those objectives. In contrast, our Petition points out various of the ways in which the Third Circuit's rule threatens or frustrates these basic goals. (Petition, pp. 17-22).

3. Contrary to Respondents' Contention, the Third Circuit's Rule Fails to Take into Account Countervailing Inequities.

In response to our argument on this aspect of the ruling below (Petition, Point 1-C), respondents deny that the Third Circuit's rule gives them more than they would have gotten had they asserted their claims in the reorganization proceedings, pointing to the priority in railroad reorganizations for payment of FELA claims of employees. (Resp. Brief, p. 14). We have not taken issue with this. We have, however, pointed to the possibility of preferential treatment where the assets of the estate available for payment of such claims might not be sufficient, resulting in only partial payment of a former employee's rightful claim.[2] This in contrast to the full payment

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[2] This could occur, for example, if administrative expenses and/or rights of mortgage bondholders to particular assets

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authorized by the Third Circuit in a post-reorganization lawsuit.

We appreciate the Third Circuit's concern for equitable treatment of former employees who suffered injuries during their employment with the debtor. However, as we have pointed out, the Third Circuit's rule may engender significant countervailing inequities. (Petition, pp. 21-22). Respondents have not dealt with these. It may be assumed that the legislators were aware of conflicting equities when they adopted programs for the reorganization of financially troubled business corporations. Their overriding objective, however, was a viable enterprise when rehabilitated and restored to the stream of commerce. To the extent that the Third Circuit's rule threatens such viability in particular cases, by denying the reorganized enterprise freedom from certain tort liabilities stemming from pre-reorganization operations, that objective may be effectively frustrated.

4. Respondents' Contention as to Lack of Conflict with Other Circuits Flows From an Erroneous Restrictive View of the Third Circuit's Rule.

As discussed in our Petition, the rule adopted below conflicts with the view of other circuits. (Petition, Point II). Respondents point out that post-reorganization FELA claims were not involved in the cases in other circuits to which we have referred. (Resp. Brief, pp. 10-13). We did

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rendered insufficient funds available to satisfy in full the claims of former employees.

not say that they were. Some involved the automatic stay provision of the Bankruptcy Code. The question there was whether the claims involved could be regarded as existing prior to the petition. Others involved questions as to whether claims for certain tortious misconduct had been discharged in reorganization proceedings. Others presented the question whether unknown but anticipated tort claims for latent injuries could be taken into account and dealt with in the reorganization. While the cited cases may not have involved FELA claims, they are inconsistent with the Third Circuit's thesis that there can be no claim for tortious misconduct which qualifies as an interest which may be affected by bankruptcy reorganization if the claim has not developed into a cause of action fully accrued for statute of limitations purposes prior to consummation of the reorganization. As discussed, the Third Circuit's *Frenville* thesis, from which its current rule has evolved, has been rejected in other circuits – expressly or impliedly. Had the case at bar arisen in one of those circuits, it seems clear that the rule adopted here would not have been applied. Here again, respondents have not attempted to support their assertion as to lack of conflict by reference to anything which would indicate that these other circuits would have ruled the same way.

The present conflict involves a question of considerable importance as to the interpretation and administration of federal bankruptcy reorganization law. It is a conflict which needs to be resolved – particularly in light of the constitutional mandate for uniform laws in bankruptcy. That lack of uniformity, and the frustration of basic objectives of federal bankruptcy reorganization

which may be engendered by the Third Circuit's rule, warrant review by this Court.

Respectfully submitted,

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